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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 672

PLANTERS COTTON OIL COMPANY, INC., OF WAXAHACHIE, TEXAS, ET AL., PETITIONERS,

vs.

GEORGE C. HOPKINS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36,486)

(36,486)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

No. 4121. Law

PLANTERS COTTON OIL COMPANY, INC., et als.

versus

GEORGE C. HOPKINS, Collector of Internal Revenue

PLAINTIFFS' ORIGINAL PETITION—Filed March 8, 1930

To the Honorable Judge of said court:

Now come Planters Cotton Oil Co., Inc., Waxahachie, Texas, Planters Cotton Oil Co., Inc., Ennis, Texas, Farmers Gins, Inc., Planters Cotton Oil Company, Waxahachie, Texas, and Planters Cotton Oil Company, Ennis, Texas, hereinafter styled plaintiffs, complaining of George C. Hopkins, hereinafter styled the defendant, and allege:

I

That the Plaintiff Planters Cotton Oil Co., Inc., Ennis, Texas, is a private domestic corporation duly incorporated [fol. 2] under the laws of the State of Texas, with its principal office and place of business at Ennis in Ellis County, Texas, in the Northern District of Texas; that the plaintiff, Planters Cotton Oil Co., Inc., Waxahachie, and the Farmers Gins Inc., is each a private domestic corporation duly incorporated under the laws of the State of Texas, with its principal office and place of business at Waxahachie in Ellis County, Texas, in said Northern District of the State of Texas; that J. O. Chapman is president and Rush Hickman is secretary and general manager of each of said corporations and is a resident of said Ellis County, Texas; that Planters Cotton Oil Company, Ennis, Texas, was and is a joint stock association with its principal place of business at Ennis in Ellis County, Texas, organized and

doing business under the management of a board of directors called trustees, with the beneficial ownership therein being evidenced by certificates of interest or stock; that the Planters Cotton Oil Company, Waxahachie, is likewise a joint stock association or trust with its principal place of business at Waxahachie in Ellis County, Texas, organized and doing business under the management of a board of directors called trustees, with the beneficial ownership therein evidenced by certificates of interest or stock; that said Rush Hickman was and is the secretary-treasurer and general manager of both of said associations; that the defendant George C. Hopkins is a citizen of the United States, County of Dallas, State of Texas, and resides and has his domicile in the Northern District of Texas, within the jurisdiction of this Court, and is now and was on the dates of payment of the taxes, interest and penalties hereinafter mentioned and alleged to have been paid to him, and continuously since that time has been and now is the duly and legally appointed, qualified and acting Collector of Internal Revenue for the Second District of Texas.

[fol. 3] II

That the matter in dispute and controversy in this case arises under the Internal Revenue Laws of the United States of America as will more fully hereinafter appear, and is in amount more than $3,000.00.

III

Plaintiffs' cause of action or controversy is as follows:

The Planters Cotton Oil Company, Waxahachie, Texas, and the Planters Cotton Oil Company, Ennis, Texas, filed a timely consolidated corporation income tax return for the fiscal year ending June 30th, 1924, said companies were associations or joint stock companies taxable under the Revenue Act of 1924 as corporations and under Section 240 (b) and (c) were affiliated and were entitled to file the consolidated return.

The owners of all of the voting or common stock of said companies and the amounts owned by each were as follows:

	Planters Cotton Oil Co., Waxahachie, shares owned	Planters Cotton Oil Co., Ennis, shares owned
H. N. Chapman	1,475	2,457
R. H. Hickman	15	17
Arthur Bounds	10	26
Totals	1,500	2,500

That neither of said companies issued any other than such voting common stock.

The said consolidated corporation income tax return disclosed a net loss amounting to $206,031.03 of which $182,-[fol. 4] 284.86 was sustained by the Planters Cotton Oil Company, Waxahachie and $23,746.17 by the Planters Cotton Oil Company, Ennis.

On August 18th, 1924, the Planters Cotton Oil Co., Inc., Waxahachie, Texas, and the Planters Cotton Oil Co., Inc., Ennis, Texas, were incorporated under the laws of the State of Texas. Certain properties owned by the aforementioned associations were transferred to the said incorporated companies in consideration of the issuance of said incorporated companies of the entire amounts of their authorized capital stock, except twenty shares in each corporation, to the stockholders of the said joint stock companies.

On September 6th, 1924, the Farmers Gins, Inc., Waxahachie, Texas, was incorporated under the laws of the State of Texas, certain properties owned by the aforementioned joint stock companies was transferred to the Farmers Gins, Inc., in consideration of the issuance by said Farmers Gins, Inc., of the entire authorized capital stock except twenty shares of said Farmers Gins, Inc., to the stockholders of the said joint stock companies.

The capital stock of said three corporations was issued to the following stockholders in the amounts stated:

	Planters Cotton Oil Co., Inc., Waxahachie, shares	Planters Co. Oil Co., Inc., Ennis, shares	Farmers Gins, Inc., Waxahachie, shares
H. N. Chapman	1,940	2,940	1,204
R. H. Hickman	15	15	6
J. O. Chapman	10	10	10
Arthur Bounds	25	25	20
J. L. Gammon	10	10	10
Totals	2,000	3,000	1,250

[fol. 5] Said stock was voting common stock and no other stock was issued by said companies.

The said joint stock companies and incorporated companies filed a timely consolidated corporation income tax return for the fiscal year ended June 30th, 1925.

The said consolidated corporation income tax return disclosed consolidated net income of the affiliated group of $69,237.00. The net income or loss of each member of the affiliated group included in said return was as follows:

Planters Cotton Oil Co., Inc., Waxahachie, gain	$52,981.25
Planters Cotton Oil Co., Inc., Ennis, gain	79,476.21
Farmers Gins, Inc., Waxahachie, gain	15,178.79
Planters Cotton Oil Co., Waxahachie, Loss	$72,699.65
Planters Cotton Oil Co., Ennis, Loss	5,699.60
Consolidated Net Income	$69,237.00

Income tax in the sum of $8,654.62 was assessed upon said consolidated return against the Planters Cotton Oil Company and affiliated companies of Waxahachie and Ennis, Texas, and was paid on December 1, 1925, by the Planters Cotton Oil Company, Inc., Waxahachie, Texas, upon behalf of all of said affiliated companies liable for income tax, as well as $54.08 interest.

Subsequently, as a result of the enactment of the Revenue Act of 1926 an additional tax in the sum of $173.10 was assessed against said affiliated companies and paid on May 15th, 1926, by Planters Cotton Oil Company, Inc., Waxahachie, for the members of the said affiliated group and by it distributed as follows:

[fol. 6] Planters Cotton Oil Co., Inc., Waxahachie	$50.00
Farmers Gins, Inc.	50.00
Planters Cotton Oil Co., Inc., Ennis	73.10
Total	$173.10

In the preparation of said consolidated corporation income tax return for said fiscal year ended June 30th, 1925, the taxpayers erroneously omitted to include as a deduction in computing net income the said net loss sustained by the said joint stock companies for the fiscal year ending

June 30th, 1924, amounting to $206,031.03, as was permitted by Section 206, of the Revenue Act of 1924.

On September 15th, 1927, the said affiliated corporations and joint stock companies filed a timely claim for refund with the Collector of Internal Revenue at Dallas, Texas, setting forth their failure to properly claim as a deduction in computing net income for the fiscal year ending June 30th, 1925, the said net loss sustained for the fiscal year ended June 30th, 1924, and asking refund of the entire amount of tax paid for said fiscal year, ended June 30th, 1925.

Thereafter the books and records of the said affiliated corporations and joint stock companies were examined by John H. Way under the direction of W. L. McBride, Internal Revenue Agent in Charge, Dallas Division, and a report on said examination was issued by said Internal Revenue Agent in Charge under date of January 24th, 1928, setting forth that the consolidated returns aforesaid filed for the years ended June 30th, 1924, and June 30th, 1925, were correct as to gross income and deductions contained in said returns with the exception that the statutory net loss as shown by the consolidated corporation income tax return, filed for the year 1924, should be allowed as a deduc- [fol. 7] tion in computing net income of the consolidated group for the fiscal year ended June 30th, 1925, and said agent recommended that the claim for refund aforesaid be allowed.

That by letter of date, to-wit: March 10th, 1928, addressed to the Planters Cotton Oil Company, Inc., Waxahachie, the Commissioner of Internal Revenue notified plaintiffs, said affiliated companies, corporations and joint stock companies, that their said claim for refund had been examined and rejected and rejection thereof would officially appear on the next schedule to be approved by the Commissioner of which plaintiffs have no notice. The substance of said grounds of rejection by the Commissioner of Internal Revenue as stated in said letter is as follows:

"The claim is based upon the statement that net loss of 1924 should be applied against consolidated net income of 1925. However, the net loss for 1924 is composed of net losses of two affiliated companies only, Planters Cotton Oil Company of Waxahachie and Planters Cotton Oil Com-

pany of Ennis, whereas there are three additional companies included in the consolidation for 1925.

"The Bureau holds that where conditions obtain similar to those existing in your case the loss of each company in the year preceding the taxable year may be applied only to net income of that company in that taxable year. Inasmuch as the companies which sustained net loss in the year 1924, also sustained net loss in 1925 no adjustment for 1924 net loss may be made, and the income shown on your return for 1925 is correct."

IV

That the consolidated returns and each of them hereinbefore set out were made under authority of law, and es- [fol. 8] pecially in accordance with Section 240 of the Revenue Act of 1924 applicable thereto. Said original joint stock companies owned, controlled and operated all the properties which formed the capital stock of the incorporated companies, to-wit, the Planters Cotton Oil Co., Inc., Waxahachie, took over from the joint stock company, the Planters Cotton Oil Company, Waxahachie, the mill plant and its appurtenances at Waxahachie, Texas; and the Planters Cotton Oil Co., Inc., Ennis, took over from the Planters Cotton Oil Company, Ennis, joint stock company, the mill plant and its appurtenances at Ennis, Texas; and the Farmers Gins, Inc., took over as its capital stock from the said two joint stock companies the gin properties set out in its consolidated return of 1924, which properties were owned and operated by the said two joint stock companies for the taxable year ending June 30th, 1924. To cover which taxable year the said Planters Cotton Oil Company, Waxahachie, Texas, and Planters Cotton Oil Company, Ennis, Texas, filed their consolidated return in accordance with law and regulations prescribed by the Commissioner of Internal Revenue, and that during said taxable year and during the taxable year 1924-1925 the ownership of the properties and voting stock of each said joint stock company and corporation was more than 95 per cent in H. N. Chapman as hereinbefore set out, and that more than 95 per cent of each and all of the said interest and stock in each and all of said companies during the fiscal year ending June 30th, 1924, and the fiscal year ending June 30th, 1925, were continuously in the same interests as aforesaid; that none of

said companies or corporations had during said years outstanding any non-voting stock or stock preferred as to dividends.

V

By reason of the facts aforesaid plaintiffs are entitled to recover of and from the defendant the said sum of money [fol. 9] so paid by them, to-wit, the sum of $8,881.80 together with interest at the rate of six per cent thereon from the respective dates of payment to the date to be fixed by the Commissioner of Internal Revenue under the Acts of Congress relating thereto, particularly Section 615, of the Revenue Act of 1928.

VI

Plaintiffs allege that all the acts and conduct of the defendant herein referred to in demanding payment of the said sums of money and interest and collecting the same were done in compliance, and under instructions from the Secretary of the Treasury and the Commissioner of Internal Revenue, and were done with probable cause and upon a trial of this case as certificate of probable cause should be granted.

Wherefore, premises considered, plaintiffs pray that defendant be cited to answer this petition and upon a final hearing thereof that they have judgment against the said defendant for the sum of $8,881.80, with interest from the dates of payment to the date to be fixed by the Commissioner of Internal Revenue under the Acts of Congress relating thereto, particularly Section 615 of the Revenue Act of 1928, together with all costs of suit, and a certificate of probable cause; and such other and further judgments, orders and decrees as they or any one or more of them may be entitled to receive.

J. M. Burford, J. L. Gammon, Attorney for Plaintiffs, Waxahachie, Texas.

[fol. 10] In United States District Court

Defendant's Original Answer—Filed May 1, 1930

To the Honorable Wm. H. Atwell, Judge of said court:

Comes now Geo. C. Hopkins, Collector of Internal Revenue, defendant in the above entitled cause, and for de-

murrer and answer herein pleads and shows to the Court as follows:

1

The defendant demurs to the plaintiffs' petition and says the same is insufficient in law and shows no cause of action against him, and of this he prays judgment of the Court.

2

If required for answer herein without waiving the foregoing demurrer, the defendant denies all and singular the allegations in plaintiffs' petition contained and demands strict proof thereof, and says he is not guilty of the wrongs and trespasses or any of them alleged therein, and of this he puts himself upon the country and prays to be adjudged to go hence without day with his costs.

3

Further answering herein the defendant prays for a certificate of probable cause in the event of recovery by the plaintiffs in any sum or amount, for that the transaction of the collection of the taxes complained of was conducted by the defendant in his capacity as Collector of Internal Revenue of the United States, in pursuance of the laws [fol. 11] thereof and regulations thereunder, and the money received by him from the plaintiffs in payment of said taxes was duly covered into the treasury of the United States according to law.

Norman A. Dodge, United States Attorney, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY TRIAL—Filed April 15, 1930

The parties to the above entitled cause, acting by their respective counsel, hereby waive jury trial and agree that the matters of fact, as well as of law, be determined by the Court without a jury.

J. M. Burford and J. L. Gammon, Attorneys for Plaintiffs. Norman A. Dodge, United States Attorney, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions, Order of Court Approving and Allowing Bill of Exceptions—Filed March 21, 1931

CAPTION

Be it remembered, that on the 2nd day of March, A. D. 1931, the above entitled cause came on for trial before the Court, a jury having been expressly waived by stipulation of the parties filed herein, the Honorable William H. Atwell, presiding, the plaintiff, Planters Cotton Oil Company, [fol. 12] Inc., Waxahachie, Texas, a private corporation, Planters Cotton Oil Company, Inc., Ennis, Texas, a private corporation, Farmers Gins, Inc., a private corporation, Planters Coton Oil Company, Waxahachie, Texas, a joint stock association, and Planters Cotton Oil Company, Ennis, Texas, a joint stock association, appearing by Messrs. J. L. Gammon and J. M. Burford, their counsel, and the defendant, George C. Hopkins, Collector of Internal Revenue, appearing by his counsel, Messrs. Norman A. Dodge and Wright Matthews, and the following proceedings were thereupon had:

Plaintiff offered the written stipulation of the parties, filed herein, as follows:

[Title omitted]

STIPULATION OF FACTS—Filed June 21, 1930

The parties to the above entitled and numbered cause, acting herein by their respective counsel, hereby agree that the following facts may be taken as true, subject, however, to the right of either party to introduce further evidence upon the trial of this cause, not inconsistent with the facts herein stipulated.

I

That the plaintiff, Planters Cotton Oil Co., Inc., Ennis, Texas, is a private domestic corporation, duly incorporated under the laws of the State of Texas, with its principal [fol. 13] office and place of business at Ennis, in Ellis County, Texas, in the Northern District of Texas; that the

plaintiff, Planters Cotton Oil Co., Inc., Waxahachie, and the Farmers Gins, Inc., are each a private domestic corporation, duly incorporated under the laws of the State of Texas, with its principal office and place of business at Waxahachie, in Ellis County, Texas, in said Northern District of the State of Texas; that J. O. Chapman, is President, and Rush Hickman is Secretary and General Manager, of each of said corporations, and each is a resident of said Ellis County, Texas; that Planters Cotton Oil Company, Ennis, Texas, is now and was at the time of, and prior to, the incorporation of the above named company and during all the times involved herein was a joint stock association, with its principal place of business at Ennis, in Ellis County, Texas, organized and doing business under the management of a Board of Directors called Trustees, with the beneficial ownership therein being evidenced by certificates of interest or stock; that the Planters Cotton Oil Company, Waxahachie, was likewise at said times a joint stock association, with its principal place of business at Waxahachie, in Ellis County, Texas, organized and doing business under the management of a Board of Directors called Trustees, with the beneficial ownership therein evidenced by certificates of interest or stock; that said Rush Hickman was the Secretary-Treasurer and General Manager of both of said associations; that the defendant, George C. Hopkins, is a citizen of the United States, County of Dallas, State of Texas, and resides and has his domicile in the Northern District of Texas, within the jurisdiction of this Court, and is now, and was on the dates of payment of the taxes and interest hereinafter mentioned and alleged to have been paid to him and continuously since that time [fol. 14] has been and now is the duly and legally appointed, qualified and acting Collector of Internal Revenue for the Second District of Texas.

II

That the matter in dispute and controversy in this case arises under the Internal Revenue Laws of the United States of America, as will more fully hereinafter appear, and is in amount more than $3,000.00.

III

That the aforesaid Planters Cotton Gin Company, Waxahachie, Texas, and Planters Cotton Oil Co., Ennis, Texas,

the joint stock associations, were, during the fiscal year ending June 30th, 1924, affiliated associations taxable as corporations within the meaning of the Internal Revenue Act of the United States, and that on September 15, 1924, they filed consolidated corporation tax return with the Collector of Internal Revenue, Second District of Texas, the fiscal year ending June 30th, 1924.

The owners of all of the voting or common stock of said companies and the amounts owned by each at that time and during said fiscal year, and also on the date of the incorporaiton of the corporations herein mentioned, were as follows:

	Planters Cotton Oil Co., Waxahachie, shares owned (par value $100.00)	Planters Cotton Oil Co., Ennis, shares owned (par value $100.00)
H. N. Chapman	1,475	2,457
R. H. Hickman	15	17
Arthur Bounds	10	26
Totals	1,500	2,500

[fol. 15] That neither of said companies issued or had outstanding any other than the aforesaid voting common stock. That, as disclosed by said consolidated corporation income tax return, said companies during the fiscal year ending June 30th, o924, reported a consolidated net loss amounting to $206,031.03, of which loss, the sum of $182,284.86 was reported as having been sustained by Planters Cotton Oil Co., Waxahachie, and $23,746.17 by the Planters Cotton Oil Company, Ennis.

IV

It is further agreed that on August 18, 1924, the aforesaid Planters Cotton Oil Co., Inc., Waxahachie, Texas, and the aforesaid Planters Cotton Oil Co., Ennis, Texas, were each incorporated under the laws of the State of Texas, the Waxahachie Company having a capital stock of $200,000.00, and the Ennis Company having a capital stock of $300,000.00, each of which was divided into shares of the par or face value of $100.00.

V

That after the two corporations aforesaid were formed, mentioned and set out in the last preceding paragraph hereof, a third corporation, Farmers Gins, Inc., was, on the 6th day of September, 1924, incorporated under and by virtue of the laws of the State of Texas, with a capital stock of $125,000.00, divided into 1,250 shares of the par value of $100.00 each. That said Planters Cotton Oil Co., of Waxahachie, and the Planters Cotton Oil Co., of Ennis, the two joint stock associations, the Planters Cotton Oil Co., Inc., of Waxahachie, and the Planters Cotton Oil Co., of Ennis, and the Farmers Gins, Inc., were during the [fol. 16] fiscal year, ending, June 30th, 1925, affiliated within the meaning of the Internal Revenue Acts of the United States.

VI

That after the formation of the three corporations herein above mentioned, the stock therein was issued and held as follows:

	Planters Cotton Oil Co., Inc., Waxahachie, shares	Planters Cotton Oil Co., Inc., Ennis, shares	Farmers Gins, Inc., shares
H. N. Chapman	1,940	2,940	1,204
R. H. Hickman	15	15	6
J. O. Chapman	10	10	10
Arthur Bounds	25	25	20
J. L. Gammon	10	10	10
Totals	2,000	3,000	1,250

That the stock in the aforesaid corporations was issued in consideration of a transfer of certain assets to them respectively by the Planters Cotton Oil Co., of Waxahachie, and the Planters Cotton Oil Co., of Ennis, the joint stock associations, which transferred assets constituted the entire assets of said corporations. All of the stock therein was common and voting stock, and fully paid as aforesaid.

VII

That on September 17th, 1925, said stock companies and incorporated companies filed with the Collector of Internal

Revenue for the Second District of Texas, a consolidated corporation income tax return for the fiscal year which [fol. 17] ended June 30, 1925, a certified photostat copy of which is attached hereto and made a part hereof and marked "Exhibit A". Said affiliated group, as disclosed by said income tax return, reported a net income for the fiscal year ending June 30th, 1925, of $69,237.00. That the following members of said affiliated group realized a net income as follows:

Planters Cotton Oil Co., Inc., Waxahachie	$52,981.25
Planters Cotton Oil Co., Inc., Ennis	79,476.21
Farmers Gins Inc., Waxahachie	15,178.79
Total	$147,636.25

That the following members of said affiliated group realized a net loss as follows:

Planter Cotton Oil Co., Waxahachie	$72,699.65
Planters Cotton Oil Co., Ennis	5,699.60
Total	$78,399.25

That the consolidated net income, as aforesaid, of said affiliated group for said year amounted to the sum of $69,237.00, and that an income tax was assessed upon such net income in the sum of $8,654.62 against the Planters Cotton Oil Co., Waxahachie, the designated parent company, and the aforesaid affiliated companies of Waxahachie and Ennis, which, together with an additional amount of $54.80 interest was paid to the defendant on December 4th, 1925, by the Planters Cotton Oil Co., Inc., Waxahachie, upon behalf of all of the above mentioned affiliated companies liable for income tax. Subsequently, an additional tax in the sum of $173.10 was assessed against Planters Cotton Oil Co., Inc., Waxahachie, and said affiliated Companies, and paid [fol. 18] to defendant on May 19, 1926, by Planters Cotton Oil Co., Inc., Waxahachie, for the member of said affiliated group liable for income tax.

VIII

That in the preparation of said consolidated corporation income tax return, and the schedules filed therewith, for

said fiscal year ending June 30th, 1925, no claim was made for any deduction with respect to the losses reported by the said joint stock companies in the consolidated returns filed by said joint stock companies for the fiscal year ending June 30th, 1924.

IX

On September 15, 1927, the Planters Cotton Oil Co., Inc., Waxahachie, in its own behalf and in behalf of the above mentioned affiliated companies, filed a claim for refund with the defendant herein, the Collector of Internal Revenue, at Dallas, Texas, a certificate photostat copy of which is attached hereto, marked "Exhibit B," and made a part hereof; that on the same date, the Planters Cotton Oil Co., Inc., Waxahachie, as such parent company, filed an amended consolidated return, a certified photostat copy of which is hereto attached, and made a part hereof, and marked "Exhibit C," for the year ending June 30, 1925.

X

It is further agreed that the net loss sustained by the Planters Cotton Oil Company of Waxahachie, and the Planters Cotton Oil Co., of Ennis, the two joint stock associations, during the fiscal year ending June 30, 1924, was sufficient to offset the total net income realized by the three corporations, to-wit, Planters Cotton Oil Co., Inc., Waxa-
[fol. 19] hachie, Planters Cotton Oil Co., Inc., of Ennis, and Farmers Gins, Inc., during the fiscal year ending June 30, 1925, and that if the net loss sustained by the two joint stock associations for the fiscal year ending June 30th, 1924, may be used as a deduction in computing the net income of the two joint stock associations for the fiscal year ended June 30th, 1925, and the net loss of said two associations thus determined may be applied against the net incomes of the three corporations, then the consolidated group, consisting of the three incorporated companies and two joint stock associations, had no taxable net income for the fiscal year ended June 30, 1925, and there was no tax due from said above plaintiffs for the taxable year ending June 30, 1925.

XI

That if the plaintiffs recover herein, it is further agreed that said recovery shall be apportioned among the affiliated companies as follows:

Planters Cotton Oil Co., Waxahachie	None
Planters Cotton Oil Co., Ennis	None
Planters Cotton Oil Co., Inc., Waxahachie	53/147ths
Planters Cotton Oil Co., Inc., Ennis	79/147ths
Farmers Gins, Inc.	15/147ths

That by letter of date March 10, 1928, addressed to the Planters Cotton Oil Company, Inc., Waxahachie, the Commissioner of Internal Revenue notified plaintiffs said affiliated companies, corporation and joint stock companies, that their said claim for refund had been examined, and would be rejected, and rejection thereof would officially appear on the next schedule to be approved by the Commissioner, which was so approved on the 26th day of [fol. 20] March, 1928. The substance of said grounds of rejection by the Commissioner of Internal Revenue, as stated in said letter, is as follows:

"IT:CR:E. JFD.

March 10, 1928.

Planters Cotton Oil Company, Incorporated, Waxahachie, Texas.

SIRS: Your claim for refund of $8,827.72, corporation income tax for the fiscal year ended June 30th, 1925, has been examined, and will be rejected.

The claim is based upon the statement that net loss of 1924 should be applied against consolidated net income of 1925. However, the net loss of 1924 is composed of net losses of two affiliated companies, only, namely, Planters Cotton Oil Company of Waxahachie, Planters Cotton Oil Company of Ennis, whereas, there are three additional companies included in the consolidation for 1925.

The Bureau holds that where conditions obtain similar to those existing in your case, the loss of each company in the year preceding the taxable year may be applied only to net income of that company in that taxable year, inasmuch as the Companies which sustained net losses in 1924 also

sustained net losses in 1925, no adjustment for 1924 net loss may be made and the income shown on your return for 1925 is correct.

The rejection of this claim will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. B. Allen, Deputy Commissioner, by H. B. Robinson, Head of Division."

MdeH-3.

[fol. 21] That said claim for refund has been denied as aforesaid, and has not been reopened, and no part thereof has been paid.

In testimony whereof witness our hands this the 20th day of June, A. D. 1930.

(Signed) J. M. Burford, (Signed) J. L. Gammon, Attorneys for Plaintiffs. (Signed) Norman A. Dodge, United States District Attorney for the Northern District of Texas, for Defendant, (Signed) by Wright Matthews, Special Attorney, Bureau of Internal Revenue.

[File endorsement omitted.]

[Title omitted]

MOTION FOR JUDGMENT ON BEHALF OF PLAINTIFFS—Filed March 2, 1931

Now come the plaintiffs in the above entitled and numbered cause, and move the Court for judgment on the following grounds, to-wit:

I

The uncontradicted evidence in this case, as stipulated by the parties, shows that the net losses sustained by the Planters Cotton Oil Company of Waxahachie and the Planters Cotton Oil Company, of Ennis, during the taxable year ending June 30, 1924, together with the net losses sustained by the Planters Cotton Oil Company of Waxa-
[fol. 22] hachie and the Planters Cotton Oil Company of Ennis for the taxable year ending June 30, 1925, exceeded

the net income of the five affiliated companies, to-wit, the Planters Cotton Oil Company of Waxahachie, the Planters Cotton Oil Company of Ennis, the Planters Cotton Oil Company, Inc., of Waxahachie, the Planters Cotton Oil Company, Inc., of Ennis, and the Farmers Gins, Inc., of Waxahachie, during the taxable year ending June 30, 1925, and that the losses sustained by Planters Cotton Oil Company of Waxahachie and the Planters Cotton Oil Company of Ennis, as a matter of law, during the taxable year ending June 30, 1924, may be used to reduce the net income of the five affiliated companies for the taxable year ending June 30, 1925, and that when so used to reduce such consolidated income, there was no net income on the part of said affiliated companies, and no tax due or payable.

II

The defendant in this case has adduced no substantial and/or sufficient evidence which warrants a judgment in favor of the defendant and against the plaintiffs.

III

As a matter of law, the taxes sought to be recovered herein were illegally assessed and unlawfully collected and are illegally and unlawfully withheld by the defendant in this case.

IV

That under the facts and the law, the plaintiffs are entitled to judgment as prayed for in their petition on file [fol. 23] herein, and plaintiffs request that if this motion be denied, that their exception be duly noted.

(Signed) J. M. Burford, (Signed) J. L. Gammon,
Attorneys for Plaintiffs.

[File endorsement omitted.]

MOTION FOR JUDGMENT ON BEHALF OF DEFENDANT—Filed March 2, 1931

[Title omitted]

Now comes the defendant in the above entitled and numbered cause and moves the Court for judgment on the following grounds, to-wit:

I

The plaintiffs have in this case adduced no substantial and/or sufficient evidence which warrants a judgment in their favor and against this defendant,

II

That the net losses sustained by the Planters Cotton Oil Co., at Waxahachie, and the Planters Cotton Oil Co., Ennis, during the taxable year ended June 30, 1924, at a time when these two associations were not affiliated with any other corporations or associations, may not be used to reduce the net income of Planters Cotton Oil Co., Inc., Waxahachie, Planters Cotton Oil Co., Inc., Ennis, and Farmers Gins, Inc., Waxahachie, during the taxable year ended June 30, 1925, at a time when the first above mentioned two associations were affiliated with the latter three named corporations and under the law entitled to file a consolidated [fol. 24] return with said corporations, the said two associations having sustained losses in the taxable year ended June 30, 1925.

III

That the taxes sought to be recovered herein were legally assessed and lawfully collected by this defendant.

IV

That on the facts and the law defendant is entitled to judgment dismissing plaintiffs' petition at their cost.

Defendant requests that if this motion be denied, that his exception be duly noted.

(Signed) Norman A. Dodge, United States Attorney,
(Signed) Wright Matthews, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

[File endorsement omitted.]

JUDGMENT—Filed March 3, 1931

[Title omitted]

On this the 2nd day of March, 1931, came on for trial the above entitled cause and appeared the parties by their

counsel and announced ready for trial, and the matters of fact as well as of law being submitted to the Court without a jury, jury trial having been expressly waived by stipula-
[fol. 25] tion of the parties filed herein, the Court after hearing the evidence and argument of counsel is of opinion the law is for the defendant, and both parties having filed motions for judgment, the motion of defendant is granted and the motion of the plaintiffs denied.

It is therefore the order and judgment of the Court that the plaintiffs take nothing by their suit herein and that the defendant collector go hence without day with his costs.

To which action of the Court in granting the defendant's motion for judgment and denying the plaintiff's motion therefor, and in entering judgment for defendant, the plaintiffs excepted and their exception was allowed by the Court.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

STIPULATION RE EXHIBITS "A" TO "C"—Filed March 21, 1931

[Title omitted]

Whereas, in the above styled and numbered cause, the parties, plaintiffs, and defendant, prior to the trial of said cause, stipulated in writing the facts therein which was duly filed herein, and to which stipulation was attached certain exhibits, as follows:

Exhibit "A".—A certified photostat copy of the consolidated corporation income tax return, for the fiscal year ending June 30, 1925, made by the Planters Cotton Oil Company, Inc., Waxahachie, Planters Cotton Oil Company, Inc., Ennis, Farmers Gins, Inc., Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, affiliated corporations, the Planters Cotton Oil Com-
[fol. 26] pany, Inc., Waxahachie, being the designated parent company, which return was duly filed with the Collector of Internal Revenue, Second District of Texas, and which exhibit is mentioned in Paragraph VII of the stipulation.

Exhibit "B".—A certified photostat copy of a claim for refund in the amount herein sued for, filed by the Planters Cotton Oil Company, Inc., Waxahachie, in its own behalf and in behalf of the above mentioned affiliated companies filed on the 15th day of September, A. D. 1927, with the defendant herein, Collector, Internal Revenue, Dallas, Texas, Second District of Texas, and which exhibit is mentioned in Section IX of the stipulation.

Exhibit "C".—A certified photostat copy of an amended consolidated return, filed on the 15th day of September, 1927, by Planters Cotton Oil Company, Inc., Waxahachie, as parent company for and on behalf of the aforesaid affiliated companies, for the fiscal year ending June 30, 1925, and which is mentioned in Paragraph IX of said stipulation, and

Whereas, no question was or is now being made or has been raised as to the sufficiency of said returns, or either of them or of the claim filed for refund, certified photostat copies of which constitute the aforesaid Exhibits A, B and C, attached to the stipulation, and in order to expedite the preparation of the record upon appeal, and to save cost in its preparation, it is hereby agreed by and between the parties, by and through their respective duly authorized attorneys of record, as follows:

1. That said record for appeal may be prepared and the stipulation be included therein, without copying or otherwise carrying up or including therein said exhibits, or any of them, above mentioned.

[fol. 27] 2. That said returns, and said claim for refund set out in said Exhibits A, B and C, were in all respects regular and in due and legal form, and no question was raised upon the trial of said cause as to their sufficiency or regularity either as to form or substance, or as to the date and place of their filing, and no question thereof is now being raised; and it is further agreed that in considering the assignments of error in this cause on appeal, said assignments may be considered for all purposes the same as if said exhibits were copied in the record.

In testimony whereof the parties have hereunto set their hands by their respective attorneys on this the 20th day of March, A. D. 1931.

Planters Cotton Oil Company, Inc., Waxahachie; Planters Cotton Oil Company, Inc., Ennis; Farmers Gins., Inc., Planters Cotton Oil Company, Waxahachie; Planters Cotton Oil Company, Ennis, Plaintiffs, by J. L. Gammon. J. M. Burford, Attorneys for Plaintiffs. George C. Hopkins, Collector Internal Revenue, Defendant, by Norman A. Dodge, Wright Matthews, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 28] (Title omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 21, 1931

Upon motion of plaintiffs, duly made, the Court makes and files this, his Findings of Facts and Conclusion of Law herein:

Findings of Facts

I find the facts in this cause to be as set out in the stipulation of the parties filed herein, which stipulation is here referred to and in all things adopted and made a part of the Court's findings.

I further find, as stipulated by the parties, that certain exhibits are attached to said stipulation and consisting of the following documents described as follows:

(1) Exhibit "A", mentioned in Paragraph VII of the stipulation, containing a certified photostat copy of a consolidated corporation income tax return for the fiscal year ending June 30th, 1925, of the following affiliated members:

Planters Cotton Oil Co., Inc., Waxahachie;
Planters Cotton Oil Co., Inc., Ennis;
Farmers Gins, Inc.,
Planters Cotton Oil Co., Waxahachie;
Planters Cotton Oil Co., Ennis,

which return was duly filed by the Planters Cotton Oil Co., Inc., designated parent Company, with the Collector of Internal Revenue, Second District of Texas.

(2) Exhibit "B", mentioned in Paragraph IX of the stipulation, which is composed of a certified photostat copy of a claim filed for refund, by the Planters Cotton Oil Co., [fol. 29] Inc., in its own behalf and in behalf of the affiliated companies mentioned in Section (1) hereof, which claim was duly fixed with the defendant herein, Collector of Internal Revenue, Second District of Texas.

(3) Exhibit "C", which is a certified photostat copy of an amended consolidated corporation income tax return filed by the Planters Cotton Oil Company, Inc., Waxahachie, the designated parent company, for the fiscal year ending June 30th, 1925, of the five affiliated companies hereinabove mentioned, which was duly filed with the defendant herein, Collector of Internal Revenue, Second District of Texas.

No question having ben raised upon the trial of this cause as to the sufficiency, either in form or contents, of said Exhibits, or any of them, or as to the time and place of the filing thereof, the Court hereby, further finds that the consolidated corporation income tax return for the fiscal year ending June 30th, 1925, duly filed, and being Exhibit "A" above mentioned, the claim for refund duly filed, and being Exhibit "B" above set out, and the amended consolidated corporation income tax return filed for the fiscal year ending June 30th, 1925, referred to above in Exhibit "C", were, each and all of them legally sufficient, both in form and contents, and that the same, and each of them, were duly filed at the time and in the place and manner provided and required by law, and that the same were legally sufficient, upon the application for refund being denied, to comply with all legal conditions precedent to the filing and prosecution of this suit.

And in order to expedite the preparation of the record upon appeal herein, and in order to save cost in the prepa- [fol. 30] ration thereof, it is ordered that said Exhibits be detached from the Stipulation and not be carried forward in the record upon appeal.

I further find that the application for refund was denied and that this suit was thereafter brought, within the time provided by law, in such cases made and provided.

Declaration of Law

From the foregoing facts, I conclude:

That the losses sustained by the Planters Cotton Oil Co., Waxahachie, Texas, and Planters Cotton Oil Co., Ennis, Texas, affiliated corporations, for the taxable year ending June 30th, 1924, cannot be used as a deduction in computing the income of said companies for the fiscal year ending June 30th, 1925, for the reasons:

First. Each of said companies that sustained losses for the fiscal taxable year ending June 30th, 1924, sustained net losses for the succeeding fiscal taxable year ending June 30th, 1925, and that the loss of each company for the year preceding the taxable year may be applied only to net income of that company in the taxable year.

Second. For the taxable year ending June 30th, 1924, there were only two members of the taxable affiliated group, whereas, for the taxable year ending June 30th, 1925, there were five members of the affiliated taxable group. On account of the addition of the three new members to the affiliated group during the taxable year, the losses sustained by any original member of the group for the year preceding the taxable year is not allowable in computing its income for the taxable year when this same [fol. 31] member sustained losses in the taxable year, to which Conclusions of Law plaintiffs except.

Dated this the 21st day of March, A. D. 1931.

(Signed) Wm. H. Atwell, Judge.

[File endorsement omitted.]

In United States District Court

Order Approving Bill of Exceptions

The plaintiff tenders and presents the foregoing as its bill of exception in this case to the action of the Court, and

prays that same be settled and allowed, and filed and sealed by the Court, and made a part of the record, and the same is accordingly done, on this 21 day of March, 1931, during the term of Court at which the above proceedings were had, and the Court here and now on this the 21st day of March, 1931, approves, allows and orders filed this bill of exceptions.

Wm. H. Atwell, United States District Judge for the Northern District of Texas, Presiding at the Trial of said cause.

O. K.

J. M. B., for Pltffs.

O. K.

Dodge, U. S. Attorney; W. Matthews, Spec. Atty., Bureau of Internal Revenue, for Defts.

Judgment omitted from the printed record, being heretofore copied at page 24.

[fol. 32] IN UNITED STATES DISTRICT COURT

Suit to Recover Payment of Income Taxes

J. L. Gammon, Waxahachie, Texas; Worsham, Rollins, Burford, Ryburn & Hicks, Dallas, Texas, for the plaintiff.

Norman A. Dodge, United States Attorney, Fort Worth, Texas, Wright Matthews, Special Attorney, Bureau of Internal Revenue, Washington, D. C., for the defendant.

OPINION OF THE COURT—Filed March 11, 1931

The five plaintiffs are associations in which Homer Chapman owned and owns over ninety-five percent of the stock. (Section 993, U. S. C. A., affiliated corporations.) Two of the five, the original Waxahachie and Ennis companies, were affiliated in 1924, and out of their assets, were created three new companies, two of which bear the same names as the old companies, and the third of which is known as the Farmers Gins, Incorporated. Chapman was, therefore, in reality the taxpayer. It is true the artificial persons were named as the respective units and the tax

was figured for each of those units, but the result of the year's work was a benefit or a loss to Chapman, and the tax was, in reality, paid by him, because he owned the companies.

The trend of judicial pronouncement, as well as the trend of legislation, is that the taxpayer shall pay on income, and only upon income. Affiliation of artificial persons works no exception. Under the present statute affiliation is unenforced, until once enjoyed. The cycle idea in business [fol. 33] is a recognition of the fact that one year may be helpful and another year hurtful—one year may be adverse and another prosperous—and supports the suggestion that, after all, the taxpayer's fortune was in the mind of the congress, even as was the thought that the government should have its exact due, without being cheated out of the same by the juggling of earnings and losses, or, by bookkeeping credits and charges of corporations controlled by the same interests.

Affiliation may, therefore, be for the interest of both taxpayer and gatherer even though some of the cases indicate its use for the benefit of the gatherer only.

In re Trentor Corn Products Co., 299 F., 326; 4 F. (2) 195; 5 B. T. A., 499.

The original Waxahachie and Ennis concerns show the consolidated net loss of $206,031.03 for the fiscal year ending June 30th, 1924. On August 18th, 1924, two of the new concerns were incorporated, and on September 6th, 1924, the third was born. Assets of the old associations were the consideration for stock in the three new ones, and for the taxable year ending June 30th, 1925, the five organizations made a consolidated return. This showed a net income for that year of $69,237.00, made up of $147,636.25, net income by the three new members, and a net loss of $78,399.25, by the two old ones. If the 1924 losses of the two originals had been utilized this net income would have been wholly destroyed, and there would have been no tax. Upon payment of the tax claim for refund was refused and this suit followed.

The plaintiffs contend that the loss suffered by the two original affiliated associations for the year 1924, may be used for the benefit of the 1925 computation.

[fol. 34] The question is troublesome. The use that may be made of a loss is not clear.

18 B. T. A., 537;
19 B. T. A., 81;
18 B. T. A., 919;
16 B. T. A., 945;
16 B. T. A., 1310;
19 B. T. A., 943.

Then, too, there is the Sweets case, 40 F., (2) 436, and, Swift & Co., vs. U. S. 38 F., (2) 363. This latter case dealt with a statute somewhat different from 206 (b), Article 937, Act of 1926. The statute there was the one which authorized the commissioner to deduct a net loss for a subsequent year from the net income of a preceding year, while the statute which regulates this case authorizes the commissioner to deduct a preceding loss from a gain of the following year. Judge Sibley, in Woolford Realty Company vs. Rose, 44 F., (2) 856, wrote about the identical question at bar and supports the defendant's contention, the Commissioner's action in refusing the refund.

It may be said that while, with one exception, the reasoning of the learned writers in the above mentioned cases, may not be upon facts exactly on all fours with those of the cause we are considering, the drift thereof is against the position of the defendant. I am not sure that optional affiliation, until once enjoyed or compelled, has any bearing upon a correct solution, but, the exact wording of the other statute cannot be ignored. "If, for any taxable year, it appears from the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeed-[fol. 35] ing year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary." 206 (b), Art. 937, Act 1926.

The tax of each member of an affiliated group is complete within itself. It is calculated without reference to the

figures, or the results of any other. The aggregate result of such individual calculations becomes the computing unit. Without the words, "computed without such deduction," the statute would be even less clear, but, with those words we need not write anything into the statute in order to limit the prior losses to the use and benefit of the taxable unit which actually made such losses, if and when there is no excess of a net loss over a net income for the subsequent year. If the net loss sustained in 1924 is used as a deduction in computing the taxpayer's net income for 1925, nothing could be carried forward to 1926, which would be, within the statute the third year of the completed cycle. I think the statute means that the two associations which sustained the net loss in 1924 could not have such net loss used as deductions in computing their net income for 1925, because such net income computed without such deduction resulted in losses and the plain wording of the statute requires that such net losses be carried forward and used as deductions in computing the net income for such taxpayers for 1926. Affiliation is of no consequence to such calculation. There must be a calculation within the terms of the law for each individual unit before a computation for the affiliated unit [fol. 36] can be used. A different basis allows evils sometimes against the payer and sometimes against the receiver, but this reading and construction preserves both, and affords a support for the belief that there was a due consideration for both in the mind of the congress.

The motion of the defendant for a verdict is sustained.

Wm. H. Atwell, United States District Judge.

At Dallas, March 2nd, 1931.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 21, 1931

Now comes Planters Cotton Oil Company, Inc., Waxahachie, Texas, a private corporation, Planters Cotton Oil Company, Inc., Ennis, Texas, a private corporation, Farmers Gins, Inc., a private corporation, Planters Cotton Oil Company, Waxahachie, Texas, a joint stock association, and Planters Cotton Oil Company, Ennis, Texas, a joint stock

association, plaintiffs herein, and say that on or about the 2nd day of March, A. D., 1931, this Court entered judgment herein in favor of the defendant, George C. Hopkins, Collector of Internal Revenue, and against these plaintiffs, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these plaintiffs, and each of them, all of which will more in detail appear from the assignment of errors which is filed with this petition.

[fol. 37] Wherefore, the above named plaintiffs, and each of them, conceiving themselves aggrieved by the judgment entered herein, as aforesaid, do hereby appeal from said judgment to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons specified in said assignment of errors, and pray that this appeal be allowed, and that a transcript of the record, proceedings and papers, upon which judgment was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

J. L. Gammon, J. M. Burford, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 21, 1931

Come now the plaintiffs, Planters Cotton Oil Company, Inc., Waxahachie; Planters Cotton Oil Company, Inc., Ennis; Farmers Gins, Inc., Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, and file the following assignment of errors upon which they and each of them will rely in the prosecution of their appeal in the above entitled and numbered cause:

I

The Court erred in refusing to grant and in denying the motion of these plaintiffs for judgment herein, which mo-

[fol. 38] tion was duly made, and presented, and on file herein.

II

The Court erred in granting and in not denying the motion of the defendant for judgment herein.

III

The Court erred in rendering judgment herein in favor of the defendant and in not rendering judgment for plaintiffs as prayed in that the uncontradicted evidence shows that the losses incurred by the Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, for the taxable year ending June 30, 1924, was more than sufficient to off-set the net consolidated income of the five affiliated companies, to-wit: Planters Cotton Oil Company, Inc., Waxahachie; Planters Cotton Oil Company, Inc., Ennis; Farmers Gins, Inc.; Planters Cotton Oil Company, Waxahachie; and Planters Cotton Oil Company, Ennis, for the succeeding taxable year ending June 30, 1925, and as a matter of law, said losses sustained by the two affiliated companies, above named, for the taxable year ending June 30, 1924, was and is allowable as a deduction in computing the income of the respective companies, to-wit: Planters Cotton Oil Company, Waxahachie and Planters Cotton Oil Company, Ennis, for the succeeding taxable year ending June 30, 1925, and, if allowed as such deduction, in computing their respective incomes for the taxable year ending June 30, 1925, there was no tax due by the affiliated group for the taxable year ending June 30, 1925, whereas, the uncontradicted evidence further shows that plaintiffs paid a tax for said taxable year ending June 30, 1925, in the amount sued for herein.

[fol. 39]

IV

The Court erred in holding that the losses sustained by the two companies, Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, respectively, for the taxable year ending June 30, 1924, could not be allowed by said companies in computing their respective incomes for the succeeding taxable year ending June 30, 1925, for if such losses were allowed in computing their respective net incomes for the succeeding taxable year ending June 30, 1925, there was no tax whatsoever due for the taxable year ending June 30, 1925.

Wherefore plaintiffs pray that the judgment of the District Court be reversed, and that such orders may be made as comport with right and justice.

J. L. Gammon, J. M. Burford, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 21, 1931

On this the 21st day of March, A. D. 1931, came plaintiffs, Planters Cotton Oil Company, Inc., Waxahachie, Texas, a private corporation, Planters Cotton Oil Company, Inc., Ennis, Texas, a private corporation, Farmers Gins, Inc., a private corporation, Planters Cotton Oil Company, Waxahachie, Texas, a joint stock association, and Planters Cotton Oil Company, Ennis, Texas, a joint stock association, and presented their petition for an order allowing them to appeal to the Honorable United States Circuit [fols. 40-42] Court of Appeals for the Fifth Circuit from the final judgment heretofore rendered and entered against them in the above named cause, on to-wit: the 2nd day of March, A. D. 1931, under and according to the laws of the United States in that behalf made and provided; and it appearing that the plaintiffs have filed in said cause an assignment of errors and a prayer for reversal of the judgment so rendered against them in said cause; it is here and now ordered that said petition of plaintiffs be, and same is hereby granted, and that the appeal to the Honorable United States Circuit Court of Appeals for the Fifth Circuit be, and same is hereby allowed as prayed for.

It is further ordered that the bond on said appeal be, and same is hereby fixed at the sum of Two Hundred Fifty ($250.00) Dollars, payable and conditioned as provided by law, and to be approved by this Court.

Dated at Dallas, Texas, this 21 day of March, A. D. 1931.

Wm. H. Atwell, Judge United States District Court for the Northern District of Texas.

Bond on appeal for -250.00, approved and filed March 21, 1931, omitted in printing.

[fol. 43] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed —— —, ——

To the clerk of said court:

We hereby respectfully request you to make up a transcript of the record in the above case to include the following:

1. Caption.
2. Plaintiffs' Original Petition.
3. Defendant's Original Answer.
3-a. Stipulation of parties waiving jury.
4. Bill of Exceptions.
5. Order of Court approving and allowing Bill of Exceptions.
6. Judgment of the Court.
7. Petition for Appeal and accompanying Assignments of Error.
8. Order allowing appeal.
9. Appeal Bond.
10. Citation on Appeal with Waiver of Service.
11. Præcipe.
12. Clerk's Certificate.

Yours very truly, J. L. Gammon, J. M. Burford, Attorneys for Plaintiffs.

[fol. 44] Citation, in usual form, showing service on Geo. C. Hopkins, filed March 21, 1931, omitted in printing.

[fol. 45] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 46] Minute entry of argument and submission, November 6, 1931, omitted in printing.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6243

PLANTERS COTTON OIL COMPANY, INC., Waxahachie, Texas, et al., Appellants,

versus

GEORGE C. HOPKINS, Collector of Internal Revenue, Appellee

Appeal from the District Court of the United States for the Northern District of Texas

(November 20, 1931)

Before Bryan, Foster, and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed November 20, 1931

HUTCHESON, Circuit Judge:

The consolidated return for the fiscal year ending June 30, 1924 of Planters Cotton Oil Company, Waxahachie, and Planters Cotton Oil Company, Ennis, unincorporated associations, 98% of the stock of which was owned by Chapman, showed a net loss of $206,031.03. Of this total $182,284.86 was the loss of the Waxahachie company, $23,746.17 of the Ennis company. For reasons of his own not disclosed by the stipulation on which the case was tried Chapman in August and September 1924 caused to be formed under the laws of Texas three corporations, Planters Cotton Oil Co. Inc. Waxahachie, Planters Cotton Oil Co. Inc. Ennis, [fol. 48] and Farmers Gins, Inc. and to be transferred to them certain of the assets of the associations. In consideration of their transfer there was issued to Chapman substantially all of the stock of the three corporations. These assets so transferred constituted the entire assets of the corporations.

For the fiscal year ending June 30, 1925 the three corporations and the two joint stock companies filed a consolidated tax return reporting a net income of $69,237.00 made up of a net income of the three corporations of $147,636.25, a loss of the two associations of $78,399.25. The tax as-

sessed upon this return was paid for the group by Planters Cotton Oil Co. Inc. Waxahachie. No claim to a deduction for the net losses sustained by the unincorporated companies was then or in fact until 1927 made by plaintiff. In 1927 claim for refund of taxes overpaid in 1925, because these net losses were not taken into account in the return and the assessment for that year, was made. The claim was rejected on the ground that the statutory net loss deduction was personal to the taxpayer which had sustained it and could be used only in computing its net income. That since neither association had net income in 1925, but in that year, as in 1924, each had sustained a net loss, it could not be availed of by any other of the affiliates having net income to diminish the net income of the group. The District Judge took the same view. Planters Cotton Oil Co. vs. Hopkins, 47 Fed. (2d) 659. This appeal has resulted.

In Woolford Realty Company vs. Rose, decided November 13th, this Court had occasion to consider generally the question here involved. There after full consideration we decided that the statutory net loss deduction was personal to the taxpayer sustaining it, could be availed of in the following year by that taxpayer alone, and by him only to the extent that he had net income in that year. That it could not be availed of to create a minus net income or loss which might be used by a member of the group which did have net income as a positive deduction against that income. [fol. 49] Were this a case as that one was, of corporate affiliation of interests theretofore distinct, brought about after the net losses had been sustained, we should dispose of this case by a mere reference to that opinion. Since, however, the differentiating facts appear here as they did in the case of National Slag Co. vs. Com'r., 47 Fed. (2d) 846, that one person has at all times been substantially the owner of all of the stock in all of the companies involved, and the tax ultimately fell on him because he at all times owned all of the companies, in the Slag case two companies so owned having been consolidated, in this case five companies so owned having been created by carving three out of the two which had sustained the net loss, it becomes necessary for us now to determine whether these differences of fact require a different legal conclusion. We do not think they do.

It is true that the facts of this case and of the National Slag Company case do present a situation of which if the matter were to be determined upon considerations of general fitness, it might be well said, as the Court did in the Slag case, "It seems on principle that the provisions of Sec. 206 should apply to the consolidated return of these affiliated companies"; but the question may not be decided upon such considerations. The rights of the claimants here must rest upon the express terms of the statute. They have no natural spring. "A deduction from gross income can be claimed only as authorized by the statute." Pugh vs. Com'r, 49 Fed. (2d) 76; Darby Lynde Co. vs. Com'r, 51 Fed. (2d) 32. The statutory net loss deduction has been definitely decided to be a deduction purely personal to the individual taxpayer sustaining it. Busch vs. Com'r, 50 Fed. (2d) 800; First National Bank of Chicago vs. U. S., 283 U. S. 142; Woolford Realty Co. vs. Rose, supra.

Unless therefore the fact that Chapman is and has at all times been substantially the sole owner of the stock both of the unincorporated associations from which the corporate taxpayers sprang and of the corporations gives him warrant to assert that in reality he has at all times been the [fol. 50] taxpayer, and the losses and gains alike have been his, the deduction may not be allowed.

It is the general rule that the corporation and the stockholders are essentially distinct entities, and though to circumvent fraud the corporate entity may be regarded as a fiction, ordinarily it must be regarded as having a real, a substantial existence. Donald vs. Herring-Hall, 208 U. S. 267; Klein vs. Bd. of Supervisors, 282 U. S. 19. Nor does the fact that one person owns all or substantially all of the stock of the corporation at all change the rule. Aiello vs. Crampton, 201 Fed. 891; Ga. Ry. Co. vs. Georgia, 289 Fed. 878; Winfield vs. Wichita, 267 Fed. 47. Particularly is it true as regards taxation and matters of Government fisc, that the members of a corporation and the corporation itself are essentially different entities. Darby Lynde Co. vs. Com'r, 51 Fed. (2d) 32; Marr vs. U. S., 268 U. S. 536; Klein vs. Bd. of Supervisors, 282 U. S. 19. The whole structure of the federal taxing system is based upon a recognition of and an exact compliance with these distinctions Fraudulent pretense absent, the Government accepts the taxpayer as it represents itself to be and one may not, chameleonlike,

change that appearance to suit his necessity or his convenience. Especially may he not, as here, for the purpose of obtaining a deduction which he could have had if the matter had taken individual form, deny that substance to these entities which in the conduct of the business, the making of the tax returns, and in all other respects he at all times has consistently and definitely affirmed.

Though, then, it is true in a sense as the District Judge said it was, that "the result of the year's work was a benefit or a loss to Chapman and the tax was in reality paid by him because he owned the companies", this is not the kind of reality of which he may avail. It is but an ultimate reality, the result of direct, of immediate realities, the operation of corporations which though created by him from the assets of unincorporated associations which he owned, [fol. 51] are none the less in law separate and distinct from each other and from him, with whom, and not with him, the Government has dealt and must continue to deal. The judgment of the Court below is affirmed.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 6243

PLANTERS COTTON OIL COMPANY, INC., Waxahachie, Texas, et al.,

versus

GEORGE C. HOPKINS, Collector of Internal Revenue

JUDGMENT—November 20, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 53] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument immediately following case No. 582, Woolford Realty Company, Inc. vs. J. T. Rose, Collector of Internal Revenue, etc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,486. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 672. Planters Cotton Oil Company, Inc., of Waxahachie, Texas, et al., petitioners, vs. George C. Hopkins, Collector of Internal Revenue for the Second District of Texas. Petition for a writ of certiorari and exhibit thereto. Filed February 1, 1932. File No. 36,486.